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Case Number 272,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DG BF, LLC, a Delaware limited liability company, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company; and JEFF A. MENASHE, individually and derivatively on behalf of AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company,	)	No. 272,2022
Plaintiffs below, Appellants,	)	Court Below: Court of Chancery of the State of Delaware
v.	)	C.A. No. 2020-0459-MTZ
MICHAEL RAY, an individual, and VLADIMIR EFROS, an individual, and AMERICAN GENERAL RESOURCES, LLC, a Delaware limited liability company,	)	
Defendants below, Appellees	)	
and	)	
AMERICAN GENERAL RESOURCES LLC, a Delaware limited liability company,	)	
Nominal Defendant below, Appellee.	)	

APPELLANTS DG BF, LLC AND JEFF A. MENASHE'S REPLY BRIEF

[PUBLIC VERSION DATED DECEMBER 2, 2022]

Of Counsel:
GERARD FOX LAW P.C.
Gerard P. Fox (*pro hac vice*)
Marina V. Bogorad (*pro hac vice*)

BELLEW LLC
Sean J. Bellew (DE No. 4072)
2961 Centerville Road, Suite 302
Wilmington, Delaware 19808

1880 Century Park East, Suite 1410
Los Angeles, CA 90067
(310) 441-0500

(302) 353-4951

Attorneys for Appellants DG BF, LLC and Jeff A. Menashe

Dated: November 17, 2022

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Appellees' Answering Brief ("AB"), for the most part, largely ignores Appellants' actual arguments;[1] instead, it paints its own picture with gusto—yet when the underlying record is checked, there is little substance behind Appellees' own bluster. Moreover, while Appellees attempt to present the underlying case as meritless, their story finds no support in the underlying record.[2] Indeed, once they get to the crux of the matter where they have to explain why their supposedly "historical" numbers were revised just a month after Appellants' investment, they point to "changing conditions in the rapidly evolving legal cannabis industry" and then cite their own expert witness designation, wherein they designated ***themselves*** as expert witnesses. (AB/7, citing A-004945-47.) Furthermore, Kevin Raesly's testimony torpedoes this contention, since he testified what assumptions were disclosed and denied that this variable was among them—instead, he specifically identified it among the "new" after-the-fact excuses raised only ***after*** Appellants invested. (A-007691-93/¶¶4-6, 10.) Doubling down, Appellees eventually rely on Raesly's reaction to AGR's ***October*** 2019 financial statement and his comments

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[1] All internal alterations, quotation marks, footnotes and citations herein are omitted, and all emphasis is added unless otherwise noted. All "Ex." references are to the documents attached to Appellants' Opening Brief ("AOB"). All the defined terms are the same as those in the AOB.

[2] As but one illustration, Appellees open their Statement of Facts contending that Appellants conducted "significant" due diligence in anticipation of a potential "$10 million investment," yet the two record cites that follow offer no support for either of the quoted propositions. (AB/7, citing A-007614/A-002468.)

about "young industry" as if he was explaining away the ***July*** 2019 revisions of the "historical" numbers at issue in Appellants' complaint (AB/21, citing A-007294).[3]

In any event, one need not go far to confirm the merits of Appellants' fraud case: indeed, even without full access, Appellants' forensic accountant concluded on the record that: (1) AGR's financials were "inadequate, incomplete, and in many cases, inconsistent;" (2) AGR's income statements were "inaccurate and unreliable;" (3) the year-end information contained in AGR's QuickBooks files failed to comport with any of the consolidated financial statements produced in discovery; and (4) one could have "no confidence in the accuracy and reliability of the Defendants' financial information …." (AOB/34n.13, citing A-001959-64/004513-17.)

Realizing as much, Appellees attempt to manufacture a narrative about Appellants' supposed improper motivations in pursuing this litigation. In this connection, they present Menashe as suing to get leverage for a mere $100,000 discount in the price of participating in the next investment round (AB/7-8, citing A-006381-85), but even this story does not add up. Indeed, the cited evidence shows Menashe was "requested" to provide a proposal for ***co***-leading AGR's next

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[3] Since Appellees had projected positive cashflow [redacted], in addition to the expected [redacted] through the promised merger (A-000816/¶60), Appellants still gave them the benefit of the doubt in October. Moreover, this was still ***before*** Appellants learned about the CFO's guilty plea and conviction and ***before*** the December 4, 2019 announcement that the company was on the brink of insolvency, [redacted] (A-000839/¶113).

investment round (rather than "insisted" on leading it), and AGR itself offered "onerous" terms for just $350,000 in return (which Menashe internally discussed as doable at $250,000, without any indication that this number was ever communicated to AGR)—an offer Menashe contemplated even after being "defrauded" because he hoped to save the company from within once some internal changes were accomplished (*e.g.*, Efros' exit). (A-00845/¶127.)

In fact, the entire opposition brief is yet another illustration of the tactics Appellees employed below to obfuscate the underlying facts in this case and bamboozle the trial court into dismissing it without trial. Take, for example, their portrayal of the trial court's reversal of the TRO: they start with the proposition that Appellants' allegations were "fictional" and then connect that notion with the court's undoing of the TRO "after full briefing" (AB/9), omitting to tell the Court that the full briefing in question presented no factual issues but rather dealt with a legal issue of contract interpretation. (AOB/9.) In turn, Appellees continue insisting that Appellants supposedly "refused" to answer core discovery identifying the misrepresentations at issue but then rely on the very responses that identify those misrepresentations. (AB/14, citing A-004218-19.)[4] Yet another lingering inaccuracy is the supposition that the trial court supposedly "ordered" Appellants

[4] Accordingly, the court did not preclude all evidence, as Appellees contend (AB/3), but only the evidence that was not identified in Appellants' responses (A-007621).

to set concrete deadlines for compliance on August 12 (AB/16)—when the actual record only reflects the court's suggestion that the parties should "negotiate" them "ideally in the form of a filed stipulation" (Ex. B/21:4-10), based on its recognition that there was a third-party vendor involved, which neither the parties nor the court could control.

Aside from all the inaccuracies sprinkled throughout their brief, Appellees also ignore core arguments, such as the trial court's fee order exhibiting impermissible double punishment (AOB/44-45) or its misplacement of claims between the March 1, 2021 ruling allowing core claims to proceed and the eventual dismissal order proclaiming there was not much left to dismiss (*id.*/34-35). The latter is especially important, given the disappearance of the declaratory relief claim relating to Menashe's removal as the Series D manager, which supposedly mooted the appeal of the TRO reversal. (AOB/9n.3.) These and other errors detailed below compel reversal.

1. The Harshest Sanction of Dismissal Was Unwarranted and Avoidable

As Appellants showed, although the trial court's dismissal rested on its finding that Appellants "ignored their discovery obligations in bad faith" (Ex. A/16), Appellants did achieve substantial compliance; moreover, there is no required "***clear*** evidence" of ***subjective*** bad faith to support the trial court's findings. (AOB/21-40.) Given that Appellants did attempt to comply despite certain limitations, the dismissal is erroneous under this Court's precedent. (*Id.*, citing, *inter alia*, *Sundor Elec., Inc. v. E. J. T. Const. Co*., 337 A.2d 651, 652 (Del. 1975) ("[S]anctions … for failure to make discovery are not ordinarily applied where there has been an active, good faith effort to comply.").) This is especially so given that dismissal, the "extreme" remedy that is the harshest sanction possible, could have been avoided by a simple trial continuance. (AOB/40-43.)

In response, Appellees spend pages simply restating the court's findings (AB/26-29) as if missing the point of this appeal entirely. As Appellants showed, the findings at issue rest on the distorted picture presented by Appellees below and erroneously accepted by the court. Upon closer examination, however, the record demonstrates that the court failed to adhere to this Court's teachings that the most "severe" sanction does not lie where other alternatives are available. Indeed, Appellees themselves rely on *James v. Nat'l Fin. LLC*, 2014 WL 6845560, *11-13 (Del. Ch. Dec. 5, 2014), where the court refused to do what the trial court did here,

despite finding that the record supported dismissal: "I will not grant that remedy in light of the Delaware Supreme Court's guidance about invoking the ultimate sanction and the availability of less punitive consequences." Similarly, even though Appellees rely on *TR Invs., LLC v. Genger*, 2009 WL 4696062, *10 (Del. Ch. Dec. 9, 2009), *aff'd*, 26 A.3d 180 (Del. 2011), the court there also refused to deploy the harshest sanction of dismissal, despite finding that the offending party "conspired" to violate the court's order "secretly, in the dead of night," thus clearly evidencing purposeful malfeasance.

As for the actual arguments supporting this appeal, Appellees have little to offer. As an initial matter, they simply ignore Appellants' analysis of the relevant *Minna* factors (AOB/31-35), including the fact that the trial court's ultimate choice of dismissal improperly rested on its perceptions of Appellants' lead trial counsel, which this Court rejected in *Hill v. DuShuttle*, 58 A.3d 403, 406-07 (Del. 2013). Appellees fare no better on the arguments they actually try to address. *First*, as Appellants showed, the four days of the supposedly "continued contumacious" conduct that the court cited as justifying its choice of the dismissal sanction rested on unproven allegations rather than actual evidence. (AOB/28-29.) In their attempt to buttress the court's finding of "continued contumacious" conduct, Appellees misleadingly cite the transcript as if the court ordered ***all*** the compliance to occur that very day. (AB/30, citing A-007241-7242.) Yet the court only ordered

compliance "today" as to the phone shipment; as for laptop and server images, they were ordered delivered as soon as "ready" (AOB/17-18/28-29, citing A-007241)—which is unsurprising, given that their readiness rested entirely within ***the third-party*** vendor's control. As Appellants showed, Menashe's phone was shipped the very next day, and laptop images were delivered as soon as they were ready (shipped the next day through overnight delivery). (A-006788/6784-85.)[5] The one-day delay in the phone shipment could hardly qualify as "contumacious," given Menashe's remote location and the arrangements he had to make to live without his phone. (*Id*.) As for the letter that Menashe included with his phone directing Appellees' vendor to withhold privileged information (which, notably, Appellees were free to direct their own vendor to disregard), Appellants were never given any chance to show that it resulted from internal miscommunications rather than some deliberate "defiant act of bad faith," as Appellees now portray it (AB33/n.11). Appellees retort that this is "irrelevant" (*id.*), apparently ignoring their own "arduous" evidentiary burden to

[5] While Appellees insist they still did not have delivery of that image as of 2:23PM on August 26 (AB/30, citing A-006736), this Court can take judicial notice that the tracking information for the laptop image, FedEx774623976659 (A-006788), shows delivery at 9:55AM that day, signed by "B. Begeman." *See* https://www.fedex.com/fedextrack/?trknbr=774623976659&trkqual=2459451000~774623976659~FX. It is also notable that while Appellees still claim that Appellants never provided them with satisfactory hit reports or privilege logs (AB/2), the record belies this contention (A-005337-38 (as of August 9, Delaware-compliant privilege log produced and hit reports provided; indeed, "Defendants communicated that they were satisfied that the updated hit list met Delaware requirements."); Ex. B/20-21 (court accepting this compliance on August 12).)

introduce "clear evidence" of "glaringly egregious" conduct required to sustain the trial court's finding of "subjective" bad faith (AOB/27-28/43-44), which it cited as warranting dismissal.

As such, Appellees are left with the sole point of the supposed noncompliance being the server image that was promised but never came,[6] yet they ignore that what came instead was Appellants' motion showing that compliance would render them in breach of their contractual confidentiality obligations owed to third parties—which the trial court expressly refused to consider. (AOB/16n.8.) As Appellants further showed, the order for the entire server image was too drastic anyway and unsupported by any standard discovery norms. (*Id.*/25-27.) Appellees respond by claiming that the trial court did not order the server's imaging until everything else failed (AB/31), but that is demonstrably false. Appellees sought images of "any servers or other repositories on which DG BF store <sic> electronic files" from the very start, and the trial court granted gave them everything they sought from the very start, too. (A-004474/A-005320.)[7]

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[6] Appellees' insistence that Appellants never "collected" the documents from the server (AB/30) stands unsupported. This is because the record shows that Appellants produced documents from the "Bloom Farms" folder from that server (A-006542/152:19-153:17) and uploaded 80% of the entire server's image for further searching as of August 25, 2021 (A-006827/n.2).

[7] Appellees also point to "the goose and gander" rule (AB30/n.9), yet, according to Appellees' own authority, it only measures burdensomeness. Here, Appellees, unlike Appellants, never claimed to be bound by any third-party confidentiality obligations, so invoking geese and ganders makes no sense. Finally,

Second, given these inaccuracies in Appellees' presentation of the record, their attempt to make Appellants' conduct sound worse than the conduct justifying dismissals in *Gallagher*, *Minna* and *Hoag* (AB/31-32) rings hollow. As Appellants showed distinguishing these cases (AOB/24-25), there was nothing "persistent" about their conduct, as only a few weeks passed from the court's initial August 3 Order until the Pencils Down Order issued on August 27—during which period Appellants did (at least) attempt to comply. By contrast, *Hoag* involved three years of noncompliance, *Gallagher* dealt with complete noncompliance, and *Minna* had continued noncompliance after a trial continuance, in addition to false testimony that caused discovery orders in the first place.

Third, Appellees' attempt to add the supposed spoliation of "evidence" to the mix fails because, as Appellants showed (AOB/35-40) and further show below, Appellees still cannot show destruction of what actually qualifies as relevant "evidence."[8]

Appellees contend that the server had documents relating to other potential cannabis investments but their supporting record citation again points only to the "Bloom Farms" folder (AB/16n.6); moreover, even if any relevant documents existed elsewhere on the server, the court never considered whether third-party confidentiality concerns outweighed any such relevance.

[8] In similar vein, while Menashe may have forgotten about his prior court ventures or exercised improper judgment as to what constitutes "doing business" by text, Appellees still cannot show why this supposedly "false" testimony should matter, as it had nothing to do with the merits of the case and could thus only affect Menashe's credibility as a witness. (AOB/45n.16.) Instead, they simply make up a supposedly "specious" strawman argument (that spoliation was not intentional

The bottom line is that Appellees try to win the day with volume, but each assertion—when checked against the record—is either overstated or just plain inaccurate. Take the parade of horribles at the start of Appellees' brief—the very first entry, for example, claims that it is an established fact that Appellants "self-collected documents," yet all it cites in support is the trial court's admonition against such practices. (AB/2, citing A-007619.) True, the admonition resulted from Appellees' *claims* that such practice occurred, but those claims were never actually proven. The most telling example of just how unsubstantiated those claims were can be seen by cite-checking Appellees' own submissions: thus, for example, they cited Menashe's deposition testimony that he was supposedly "in charge" of Appellants' collection efforts (A-005054, citing A-005132/28:23-25),[9] yet the very next page of the deposition transcript clarifies that testimony to show that Menashe hired a third-party vendor to perform the actual collection (A-005133/29:1-22). There is no support for this proposition elsewhere in the record, yet Appellees cite it as if this was an actual finding by the trial court.

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because Appellants were not aware of their obligations, AB/38 (providing no citation to the AOB)) and try to defeat it by pointing to Menashe's prior litigation experience. Suffice it to say that this is not among Appellants' arguments on this appeal.

[9] The other supposed "evidence" cited in support (A-005054-55, citing A-005078/40:18-23 & A-005086/103:7-13) even includes counsel's objections, as well as answers to questions framed specifically to elicit the answers they did, such as "did you yourself do this"—which, when answered in the affirmative, fails to exclude the fact that Menashe was not the only one that did.

As such, all Appellees have to show is a few weeks of imperfect compliance that just does not add up to the level of "extraordinary" showing required to support the trial court's cited reasons for deploying the harshest sanction to dismiss the case and deny Appellants their day in court.

2. Spoliation Findings Are Unsupported

As Appellants further showed, the trial court partially grounded its dismissal on the supposed spoliation of evidence, yet it ignored the preexisting policies of laptop donation and text purging and failed to engage into the necessary analysis as to whether the allegedly destroyed "evidence" was even relevant, let alone "favorable" to the Appellees as required to establish spoliation. (AOB/35-40.) Indeed, while Appellees cite the court's comments at the hearing that Menashe used texts "to communicate about this matter" (AB/35), this does not even establish basic relevance; for example, setting meetings and calls through text messages, which is what most of the recovered texts within the "anticipation of litigation" window showed (AOB/38n.14), is hardly substantive.

In response, Appellees contend that there are no "clearly erroneous facts" underlying the spoliation finding, yet, as if to contradict themselves, they start with one: namely, that Menashe supposedly "persisted" in deleting his text messages "through two depositions" in July/August 2021 (AOB/33). Yet the testimony that the court cited in support of this finding (Ex. A/5n.18, citing A-006559-60) only showed that Menashe deleted text messages sometime after the litigation started, without specifying the exact timing; moreover, those were texts from ***Appellees' own representatives*** directed ***to*** Menashe—in other words, Appellees themselves sent them and thus presumably retained copies. Notably, as Menashe mechanically

deleted all texts without answering, it is unclear how this could be any kind of evidence at all, as he did not actually ***say*** anything.

Appellees' remaining arguments in support of the supposed spoliation are of similar ilk. They blame Menashe for being ignorant of technical terms such as "litigation hold" but cannot actually show any substantial violation of such a hold, given the evidence that all of Appellants' documents were kept on the auto-preserve mode according to the applicable industry regulations (AOB/13). Ironically, Appellees argue that Menashe never issued an "internal" hold notice, even though Menashe testified that for purposes of DG BF, he was a one-man shop.

Appellees also try to paint the routine policy of laptop donation as something sinister based on Raesly's and Levit's computers turning up intact after all. Appellees thus simply ignore (as they often do) the COVID effect, which prevented these employees from following the preexisting policy due to the combined effect of the stay-at-home orders and the resulting shipment logistics. (AOB/13.)[10] While Appellees claim that any preexisting policy should have been suspended once Appellants anticipated litigation,[11] this does not mean that failing to do so amounts

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[10] Appellees' contention that they learned about this "on the eve of trial" is another overstatement. (AB/11-12, citing testimony provided on July 27, 2021).)

[11] Notably, Appellees ignore the trial court's finding that Menashe's own laptop was wiped and donated in ***February*** 2020 (Ex. A/5n.16)—that is, months before he anticipated litigation (AOB/35-36). While Appellees cite Menashe's testimony that this supposedly happened in ***December*** 2020 (that is, after litigation started (AB/12/35)), Menashe also testified that he could not recall the exact month of this

to spoliation. In fact, this notion is directly contrary to this Court's teachings that where conduct falls within "ordinary and routine data retention and deletion procedures," there is no required culpability to sustain spoliation. (AOB/36, citing *Genger v. TR Invs., LLC*, 26 A.3d 180, 193 & n.49 (Del. 2011), and *Sears, Roebuck & Co. v. Midcap*, 893 A.2d 542, 548 (Del. 2006).) *Accord Duong v. Benihana Nat'l Corp*., 2022 WL 1125392, *2 (3d Cir. Apr. 15, 2022) ("[A] finding of bad faith is pivotal to a spoliation determination … [which] does not arise where the destruction was a matter of routine with no fraudulent intent.") (original alteration); *cf. Phelps v. West*, 2017 WL 4676651, *4 (Del. Super. Ct. Oct. 17, 2017) ("The Supreme Court has held a trial court may not draw an adverse inference when destruction of documents occurred in the ordinary course of business."), citing *Sears*, 893 A.2d at 548. In any event, laptop donation, for one, is simply irrelevant because all the laptop data was automatically backed up as well and thus preserved for litigation purposes. (A-006488/29:4-14; A-006495/59:23-60:5.)

Appellees' pièce de résistance of the claimed spoliation is the March 2020 text message, in which Menashe supposedly texted Ray, one of the Appellees, and "proposed to lead a $5 million to $6 million" round of investment three months before litigation. (AB/34-35.) But Menashe had been asked to co-lead (rather than "proposed") this round a month earlier and disclosed this proposal ***in the complaint***.

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donation. (A-005586-87/108:22-110:4.)

(AOB/47-48, citing A-000845/¶127 ("On February 14, 2020, the Directors and Observers had a conference call where Menashe and David Nichols were asked to submit a term sheet to lead the new financing with the understanding Demeter Group would be running the fund raising process at no cost to the Company albeit simply to protect the Series D investors and bring 'credibility' to the financing process given the failure of the Series D financing round on so many levels and its recent closing.") & A-001122 (email confirming the same).) Indeed, as Appellants showed, both Appellees' and the trial court's fascination with this text is flabbergasting, given that it was part of Appellants' allegations from the start, and the text message at issue merely reflected the evolving terms of the February proposal discussed in the complaint. Moreover, this same text message also demonstrates that as of March 2020, Menashe was still trying to fix the company from within, thus foreclosing any reasonable possibility that he anticipated litigation at the time and thus should have thought to preserve the message contrary to his regular mechanical practice of immediate text purging "in real time"—especially given that it was directed to one of the eventual defendants.[12]

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[12] This also contradicts Appellees' claim that Menashe anticipated litigation as soon as he felt "defrauded" in July 2019 (AB/37). Yet, as of March 2020, Menashe was still willing to lead another investment round to fix the company from within—indeed, he had obtained extensive concessions, such as Ray's promises to get Efros out of management. (A-001122.) This is inconsistent with contemplating litigation. Indeed, Appellees' own authority shows that contemplation of litigation usually starts with contacting an attorney. *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, *29

Finally, Appellees never even address the simple fact that any deleted text messages were equally available to them—be it because they were parties to them or could obtain them through third-party subpoena process, such as through Menashe's cell service provider. Yet this negates any intentional spoliation as a matter of law. (AOB/38-39 (collecting authorities).) Instead, Appellees rely on geese and ganders again (AB/37 (claiming Appellees themselves were required to engage into extensive preservation efforts)), ignoring that because Appellees had in their possession and control the very text messages that Menashe deleted, they simply cannot establish any prejudice resulting from that conduct. As such, sanctioning Appellants for their ***non***prejudicial conduct equates with unfair one-sided burdens rejected by other courts. (AOB/38-39.)

(Del. Ch. July 22, 2015). As the introductory "shot over the bow" email shows here (A-007265), Menashe first contacted an attorney in May 2020.

3. The Right Standard Would Have Yielded a Continuance and Obviated Any Need for Dismissals

Finally, Appellees do not even contest Appellants' showing that the trial court applied the wrong standard when it denied Appellants' request to continue the September trial date. (AOB/40-43.)[13] As Appellants showed, when measured by the correct "good cause" standard, their showing would have carried the day and obviated the eventual dismissal sanction, especially considering that courts around the country accepted the Pandemic and its effect on litigation as sufficient "good cause" to justify similar relief. (*Id.*/40-41 (collecting authorities).)

Instead, Appellees resort to misleading propositions, such as, for example, that Appellants' request for continuance had nothing to do with the court's "discovery ***orders***." (AB/38.) This is a strawman argument, since Appellants sought to continue trial on August 2, and the first discovery order did not issue until August 3—as such, it obviously had nothing to do with any unissued "orders." Yet it had everything to do with securing additional time to complete discovery and thus dealing with any compliance deficiencies. Indeed, Appellants moved to continue trial because, *inter alia*, the scheduling order did not provide sufficient time for fact discovery before expert discovery became due (and they failed to appreciate this

[13] In fact, they only further exacerbate the problem by relying on authority employing yet another inapplicable standard—this time, the much more demanding "manifest injustice" standard governing continuances after final pretrial conferences under the Delaware Superior Court Rules. (AB/40, citing *Meck v. Christiana Care Health Servs., Inc*., 2011 WL 1226456, *2 (Del. Super. Ct. Mar. 29, 2011).)

defect when agreeing to the scheduling order); moreover, the court heard extensive argument as to the continued need for relief on August 12, which included the full submission on the Pandemic effect (A-005297-98/A-005301; Ex. B22/25-29/30-32 (arguing, as of August 12, that "[w]e do need some relief from the scheduling order, Your Honor, in order to fairly try this case" and describing the Pandemic effect on, *inter alia*, service of witnesses and other discovery)).[14] Accordingly, if the trial court applied the correct standard of "good cause" and gave Appellants more time for compliance, it would have obviated any eventual dismissal sanctions.

In any event, as Appellants showed and Appellees ignored, trial continuance was always available to the trial court as an alternative to dismissal—even after it denied it. The trial court always has discretion to manage its docket and provide more time for compliance—especially when Appellants' day in court is on the line. Appellees' contention that Appellants waived any continuance just because they did not re-raise it after it was denied[15] is ironic, considering Appellees' own laments

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[14] This explains why nobody complied with the expert disclosure deadline—including Appellees, since they only disclosed *themselves* as experts. (AOB/12n.4.) In turn, Appellees' incredulous claim that Appellants "were inactive for the first several months" (AB/39) is just plain false—not only did Appellants start producing documents as of May 7, 2021 (as opposed to Appellees' own dump only a month later) but also engaged in several months of extensive correspondence with Appellees concerning ESI protocol and other discovery issues. (AOB/11.)

[15] Appellees also misquote Appellants' counsel by insisting that they agreed to some nonexistent "new schedule" as of August 12 (miscited as "August 13," AB/41), thus supposedly dropping the request for trial continuance. The discussion as to what was "workable," however, related to Appellants' ability to set specific dates

that Appellants brought too many re-argument motions. Moreover, as Appellants further showed, any notion of waiver here is wrong. (AOB/42.)[16] As this Court's opinion in *Christian v. Counseling Res. Assocs., Inc*., 60 A.3d 1083, 1087 (Del. 2013), shows, where an earlier erroneous denial of trial continuance eventually led to dismissal, the latter is reversible despite the fact that appellant never re-raised the continuance after it was denied. Indeed, as *In re ExamWorks Grp., Inc. S'holder Appraisal Litig*., 2018 WL 1008439, *9 (Del. Ch. Feb. 21, 2018), trial continuance is always available as an alternative to a dismissal sanction even if no party asked for it.

Finally, Appellees' apparent attempt to manufacture prejudice from the requested continuance (AB/40-41) pales in comparison with the prejudice suffered by the Appellants as a result of the dismissal sanction. In any event, Appellees' supposed prejudice boils down to the ordinary burdens of litigation, which courts employing the applicable standard reject as insufficient. *See*, *e.g., Bagher v. Auto-Owners Ins. Co*., 2013 WL 5417127, *3 (D. Colo. Sept. 26, 2013) ("[O]rdinary burdens associated with litigating a case do not constitute undue burden when considering prejudice to Defendant under the ["good cause"] … factors.").

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for their anticipated compliance. (Ex. B/18-19.) Just a few pages later, Appellants' counsel reaffirmed the need for the requested trial continuance was "as ardent now as it was when it was originally filed" (*id.*/22:6-7).

[16] Notably, none of Appellees' authorities (AB/41) deals with waivers of arguments for purposes of appeal.

4. The Fee Order Is Impermissible Double Punishment That Is Grossly Excessive

As Appellants showed, the shift of attorneys' fees ordered by the trial court for the entire litigation was also erroneous for essentially two reasons. One, contrary to the Supreme Court authority, it punished Appellants for their supposed discovery misconduct twice. (AOB/44-45.) Two, the record failed to rise up to the "stringent," "arduous" and "extraordinary" standard of "clear" evidence demonstrating "subjective bad faith" that this Court requires to overcome the "presumption" that each litigant bears his own fees. (*Id.*/45-50.)

In response, Appellees do not even contest the first reason. (AB/42-46.) In fact, they confirm that Appellants' discovery conduct, for which the fees had been already shifted, was one of the grounds for ordering the shift for entire case. (*Id./*43.) This is contrary to *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186-90 (2017), and thus reversable in itself.[17]

Appellees fare no better in their attempt to contest the second reason.[18] They

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[17] To the extent *Kaung v. Cole Nat. Corp*., 884 A.2d 500 (Del. 2005), is inconsistent with the *Goodyear* mandate that any sanctions must be specifically "calibrated" to reimburse for the underlying misconduct and cannot simply "punish" without specific procedural safeguards, it may no longer be considered good law. Moreover, unlike here, the fee order in *Kuang* was after a trial, wherein evidence and testimony was heard. It is also noteworthy that the entire proceeding in *Kuang* proved unnecessary, since plaintiff's suit was for fee reimbursement, which he received the day after he filed suit, yet he proceeded with litigation anyway. *Id.* at 505.

[18] Appellees also incorrectly state that Appellants have not challenged the shift of fees under Rule 37. Appellants challenged all the findings of bad faith below as

start by contradicting themselves, first positing that there is "no single standard of bad faith"—only to discuss the required "clear evidence" standard of bad faith one page later (AB/43-44). They then discount Appellants' "success" at the pleading stage as supposedly based on untested veracity of Appellants' allegations (*id.*/44) but then never even attempt to show ***which*** of those allegations were untrue. Instead, they unabashedly announce that the trial court "found … that each allegation was false" (*id.*/21, citing A-007772-74), yet their cited support is nothing but the court's conclusion that litigation was "frivolous" because it was pursued for improper purpose. Indeed, it is on this "improper purpose" that Appellees' opposition eventually comes to rest in its entirety (*id.*/44-45).

Yet, knowing what Appellants knew when they filed their complaint (as reflected in their allegations), the trial court itself concluded that it was "reasonable" for them to: (1) infer that Appellees knew that their CFO was involved with a Ponzi scheme with another company as of June 2019—if only because Efros discussed this investigation with Menashe mere two months later, and (2) conclude they had been defrauded based on, *inter alia*, changed "historical" numbers and the disappearing merger. (A-002419-21/n.201.) None of these allegations proved untrue; rather, it is only Appellants' *motivation* that ultimately became suspect. As Appellants' further showed, this came about based entirely on two emails showing

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unsupported by the record.

prelitigation chatter that Appellees have blown out of proportion (AOB/46-47). The trial court never took evidence or heard any testimony as to what those emails actually meant, yet it somehow held them to present "clear" evidence of "subjective" bad faith. Moreover, Appellees do not even defend the linchpin of the trial court's "bad faith" findings—namely, a supposedly concealed March 2020 text message showing Menashe's willingness to co-lead another round of investment. This would be indeed difficult to defend, given that this information was part of Appellants' initial allegations—the very same allegations that the trial court held to produce a "reasonable" inference of fraud only a few months earlier (*id.*/47-48).[19]

Appellees conclude by speculating that this is why Appellants ended up with their discovery shortcomings—they must have had some ulterior motive, say Appellees. But speculation does not "clear" evidence make. As Appellants showed, there is an entirely reasonable alternative explanation—such as, for example, the combined effects of the global Pandemic and the sheer

[19] Appellees also cite documents that the trial court discarded as insufficient to support a "bad faith" finding, since they never made it into its fee order, such as Appellees' supposed "immediately" notified Appellants of the financial revisions in July 2019, which was merely a cryptic auto notification that some unspecified changes happened in the data room (A-000830/¶93; A-007272(Raesly: "I just got a notification from the data room that files were uploaded")), as well as their supposed provision of access to their "financial model," which Appellants never alleged was entirely hidden but rather claimed was never turned over for an independent review because the file was supposedly too large and only Roach could run it (A-000830/¶91).

outspending/outnumbering by Appellees' defense mounted by ***three*** law firms at once. As such, the record simply falls short of the required "clear evidence" standard to support the fee shift as ordered. *Cf. Block Fin. Corp. v. Inisoft Corp*., 2006 WL 3240010, *4 (Del. Super. Ct. Oct. 30, 2006) (where plaintiff "offered alternative explanations … which suggest that there was no bad faith," the latter becomes a factual issue to be resolved at trial).

Finally, as to the excessiveness of the fee order, Appellees, once again, simply rely on the trial court's findings (AB/45-46), without any regard to the authorities cited by Appellants (AOB/51-52) showing that for this case—which involved only ten months of active litigation without trial, with no expert discovery and only three depositions—the award is simply disproportionate to the benefit it produced, being about half of the avoided $5M in damages. As such, this is a separate and independent ground for the requested reversal.

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Of Counsel:
Gerard P. Fox (*pro hac vice*)
Marina V. Bogorad (*pro hac vice*)
GERARD FOX LAW P.C.
1880 Century Park East, Suite 1410
Los Angeles, CA 90067
Telephone: (310) 441-0500
gfox@gerardfoxlaw.com
mbogorad@gerardfoxlaw.com

/s/ Sean J. Bellew
Sean J. Bellew (#4072)
BELLEW LLC
2961 Centerville Road, Suite 302
Wilmington, Delaware 19808
Telephone: (302) 353-4951
sjbellew@bellewllc.com

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. Appellants' Reply Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word.

2. Appellants' Reply Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,499 words, which were counted by Microsoft Word.

Dated: November 17, 2022

Of Counsel:
Gerard P. Fox (*pro hac vice*)
Marina V. Bogorad (*pro hac vice*)
GERARD FOX LAW P.C.
1880 Century Park East, Suite 1410
Los Angeles, CA 90067
Telephone: (310) 441-0500
gfox@gerardfoxlaw.com
mbogorad@gerardfoxlaw.com

/s/ Sean J. Bellew

Sean J. Bellew (#4072)
BELLEW LLC
2961 Centerville Road, Suite 302
Wilmington, Delaware 19808
Telephone: (302) 353-4951
sjbellew@bellewllc.com

CERTIFICATE OF SERVICE

I, Sean J. Bellew, certify that on December 2, 2022, I caused a copy of the foregoing APPELLANTS DG BF, LLC AND JEFF A. MENASHE'S REPLY BRIEF [PUBLIC VERSION DATED DECEMBER 2, 2022] to be served on the following counsel of record, via File & ServeXpress:

Sean A. Meluney
MELUNEY ALLEMAN & SPENCE, LLC
1143 Savannah Rd., Suite 3-A
Lewes, DE 19958

David B. Anthony
BERGER HARRIS LLP
1105 N. Market Street, Suite 1100
Wilmington, Delaware 19801

Perry Woodward
Jedidiah Dooley
HOPKINS & CARLEY
70 South 1st Street
San Jose, California 95113

Dated: December 2, 2022

/s/ Sean J. Bellew
Sean J. Bellew (#4072)
BELLEW LLC
2961 Centerville Road, Suite 302
Wilmington, Delaware 19808
Telephone: (302) 353-4951
sjbellew@bellewllc.com